

NO. 22477

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
LORRAINE M. JHUN, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 99-0340)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Lorraine M. Jhun (Jhun) appeals the April 26, 1999, judgment convicting her of Harassment, in violation of Hawai'i Revised Statutes (HRS) § 711-1106 (Supp. 1999), and sentencing her to pay a \$250 fine, write a letter of apology to Diana Chau (Chau), and stay away from Chau for a period of thirty days. Jhun contends the circuit court erred when it failed to qualify an interpreter, excluded relevant evidence, improperly curtailed Jhun's cross-examination of state witnesses, and wrongfully denied Jhun's motion for judgment of acquittal based on insufficiency of evidence. We disagree with Jhun's contentions and affirm the April 26, 1999, judgment of the circuit court.

I. BACKGROUND

On October 30, 1998, Jhun, Diana Chau (Chau), and Young Won Kim (Kim) were employed as independent vendors at Duke's Lane. Kim testified that he had sold "a lot of different things" to a group of four customers that morning. The customers returned later that day to pick up the merchandise. While Kim interacted with his customers, Chau stood next to one and allegedly offered them the same merchandise at a cheaper price. Kim testified that he was "very uncomfortable" and "a little bit afraid because she was cutting down the prices." Jhun told Chau, "Mr. Kim already sold the merchandise. So don't create any problem." When Jhun didn't get a response from Chau, Kim testified that Jhun "tapped gently and tried to get the attention of Diana [Chau]."

In contrast, Chau testified that at approximately 5:30 in the evening she was working at her sister's cart and talking with a customer. Chau testified that while she was talking with a customer, "someone attacked me from behind and pushed me forward. And when I were hit, I were push forward." Chau felt she was "hurt badly" on her "left shoulder." Chau turned to see who "attacked" her and saw Jhun, who was scolding her saying, "you are crazy. Shut your mouth." Chau saw Jhun "walking back to her shop very fast. And she still scolding in her language."

II. STANDARDS OF REVIEW

A. Admissibility of Evidence

"[D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue." Kealoha v. County of Hawai'i, 74 Haw. 308, 319, 844 P.2d 670, 676, reconsideration denied, 74 Haw. 650, 847 P.2d 263 (1993). A trial court's determination under Rule 401 of the Hawai'i Rules of Evidence (HRE) as to relevance of proffered evidence is reviewed on appeal de novo under the right/wrong standard. State v. Alston, 75 Haw. 517, 538, 865 P.2d 157, 168 (1994). Evidentiary rulings that require a "judgment call" are reviewed for abuse of discretion. Kealoha, 74 Haw. at 319-20, 844 P.2d at 676. Specifically, appellate courts apply an abuse of discretion standard when resolving HRE Rule 403 objections. Id. at 323, 844 P.2d at 677.

B. Scope of Cross-Examination

A defendant has the right to confront adverse witnesses under the confrontation clauses of the Hawai'i and United States Constitutions, and a violation of this right is subject to the harmless beyond a reasonable doubt standard. State v. White, 92 Hawai'i 192, 198, 990 P.2d 90, 96 (1999). Under this standard, the court must "determine whether there is a reasonable possibility that the error complained of might have contributed

to the conviction." Id. (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996)).

C. Denial of Motion for Judgment of Acquittal

The standard of review to be applied by an appellate court in ruling upon a motion for a judgment of acquittal is "whether, upon the evidence viewed in the light most favorable to the prosecution and in full recognition of the province of the jury, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." Alston, 75 Haw. at 528, 865 P.2d at 164.

D. Sufficiency of the Evidence

Looking at insufficiency of evidence claims on appeal, the test is "whether, viewing the evidence in the light most favorable to the State, there is substantial evidence to support the conclusion of the trier of fact." State v. Ildefonso, 72 Haw. 573, 576, 827 P.2d 648, 651 (1992). "'It matters not if a conviction under the evidence as so considered might be deemed to be against the weight of the evidence so long as there is substantial evidence tending to support the requisite findings for the conviction.'" Id. at 576-77, 827 P.2d at 651 (quoting State v. Tamura, 63 Haw. 636, 637, 633 P.2d 1115, 1117 (1981)). "'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a man of reasonable caution to reach a conclusion." Ildefonso, 72 Haw. at

577, 827 P.2d at 651 (quoting State v. Naeole, 62 Haw. 563, 565, 617 P.2d 820, 823 (1980)).

III. DISCUSSION

A. Qualification of Interpreter

Jhun contends her conviction should be reversed because the circuit court erred in failing to qualify an interpreter.¹

Jhun contends the interpreter used at trial was not qualified pursuant to HRE Rules 604 and 702, which state:

Rule 604 Interpreters. An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 702 Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

A preliminary determination of an interpreter's qualifications is a matter within the discretion of the trial court. John Ii Estate v. Judd, 13 Haw. 319 (1901). A party has the right to cross-examine a witness offered as a translator to test the qualifications of the witness. McCandless v. Waiahole Water Co., 35 Haw. 314, 320 (1940). At trial, Jhun did not

¹ The State improperly responds to Jhun's contention in its counterstatement of the case and not in its argument section as required by Rule 28(c) of the Hawai'i Rules of Appellate Procedure.

challenge the qualifications of the interpreter; in fact, Jhun's counsel stated "I'm not challenging the interpreter"

In her point of error, Jhun argues that the court did not properly qualify the interpreter and the interpreter may have been less than competent. In State v. Casipe, 5 Haw. App. 210, 686 P.2d 28, cert. denied, 67 Haw. 686, 744 P.2d 781 (1984), this court held:

Where the incompetence of the interpreter is claimed by a defendant to have deprived him of a fair trial, the crucial question is: Was the testimony as presented through the interpreter understandable, comprehensible, and intelligible, and if not, whether such deficiency resulted in the denial of the defendant's constitutional rights? If so, the conviction must be reversed.

There is a rebuttable presumption that an interpreter in the course of performing his official duty has acted regularly. Although an interpreter may have encountered some difficulties translating the testimony, those difficulties, without more, are not sufficient to rebut the presumption. Courts have recognized that words in one language may not be capable of exact translation into another language, and it is therefore impossible in certain circumstances for an interpreter to convey the precise language of the witness to the court, jury, or defendant.

5 Haw. App. at 214, 686 P.2d at 32-33 (citations omitted).

Jhun has not shown, and the record does not indicate, that the interpreter's "ineffective" translation was prejudicial to Jhun. The presumption that the interpreter "acted regularly" has not been rebutted by Jhun.

In the argument section of her brief, Jhun ignores HRE Rules 604 and 702 as support for her point of error and argues that the circuit court violated "POLICIES FOR INTERPRETED PROCEEDINGS IN THE COURTS OF THE STATE OF HAWAI'I" (Policies)

adopted June 22, 1995. This argument was not raised in Jhun's points of error. The Policies by their own terms are offered as "a guide." Jhun cites no authority to the contrary. Additionally, Jhun makes no showing how the alleged violation of the Policies had anything to do with the outcome in this case.

B. Exclusion of Evidence

Rule 28(b)(4) of the Hawai'i Rules of Appellate Procedure (HRAP) requires an opening brief containing a section setting forth:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

Jhun's opening brief does not contain a statement of points of error section that complies with HRAP 28(b)(4) as to

her contentions that the circuit court excluded relevant evidence vital to her defense. Jhun does not set forth the alleged error committed (what evidence was excluded); where in the record the evidence was excluded; where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court; or a quotation of the grounds urged for the objection and the full substance of the evidence rejected.

Jhun argues she was denied a fair trial because of the circuit court's exclusion of relevant evidence. Jhun argues she was not allowed "to vigorously question Chau," and "[b]y not allowing the defense to introduce evidence relevant to Chau's and others' motives, [she] was deprived of evidence crucial to mount a proper defense." Since Jhun's points of error are of no assistance in pinning down her complaint with the circuit court, we must go to Jhun's statement of the case to find what errors she claims merit a reversal of the circuit court's judgment.

Defense counsel argues that "[t]he court refused to allow defense counsel to cross-examine Chau by use of a declaration executed by Diana Chau on March 17, 1999, in support of Chau's application for a temporary restraining order based upon the same facts alleged in this harassment case." The State filed Motion in Limine #3, which sought to "preclude any evidence of any bad acts of any of the State's witnesses with respect to

any prior or subsequent court proceedings, court hearings, and pending court cases involving both the defendant [Jhun] and Diana Chau." The motion sought to preclude evidence that Chau had filed for a restraining order against Jhun that was later resolved in favor of Jhun. The motion was in part based on HRE Rule 403, which allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The court granted Motion in Limine #3 "[w]ith regard to all these other proceedings" on the "basis that it really has no relationship to what took place on the date in question."

Jhun admitted that the outcome of the temporary restraining order proceeding was not relevant, but requested the right to cross-examine Chau on her written statement in support of her application for a temporary restraining order against Jhun. Jhun did not state what was contained in Chau's written statement or why it was necessary as part of Jhun's cross-examination of Chau. The court stated it would not allow Jhun to use Chau's written statement because it would "open the door" to the temporary restraining order proceedings in which the statement was submitted. Chau's written statement was not made part of the record in this case and Jhun did not state what was

in Chau's statement, so there is no way to determine whether the court's ruling to exclude Chau's statement hampered Jhun's cross-examination of Chau. Therefore, there is no basis to determine whether Jhun should have been allowed to cross-examine Chau on her written statement, or, if Chau's written statement were improperly excluded, how this exclusion might have contributed to Jhun's conviction.

Jhun contends that her right to cross-examination was denied because the court would not allow Jhun to cross-examine Chau about a report by her treating physician (Dr. Rodwell). The trial court sustained the State's objection and stated "[t]hat's not yet introduced. And this is not the appropriate time to bring it up Maybe at a later point you can question Dr. Rodwell." Later in the trial, defense counsel cross-examined Dr. Rodwell on this issue.

Jhun contends she was denied the right to cross-examine Chau's husband about "the manner in which Mr. Chau revealed himself to be a witness." However, the following excerpt from the record indicates Jhun was given that opportunity:

Q: [Defense counsel] Mr. Chau, when did you first know that you were going to testify today?

A: [Mr. Chau] I when my -- receive a letter from the prosecution office and asked her [sic] any other witness. And at that time I asked my wife to put my name as witness for the situation.

Q: When was that?

A: I don't recall the time and date.

Jhun also contends that she was not permitted to ask the investigating officer if he knew Mr. Chau.

Q: [Defense Counsel] Do you know whether or not Diana Chau's husband was present at any time?

A: [Police Officer Snoops] No, sir.

Q: Do you know him?

Ms. Ikeda [Deputy Prosecuting Attorney]: Objection, Your Honor. Lack of foundation. If he even knows she was married, if she [sic] even knows who the husband is, if he even knows what he looks like.

THE COURT: Sustained.

The court sustained the objection to the question on the ground of lack of adequate foundation. Jhun did not then attempt to lay a foundation and has not now shown how the court's ruling had anything to do with the outcome in this case.

C. Cross-Examination of State Witness

Jhun contends in her points of error that her rights under "the Sixth Amendment of the United States Constitution and Art. 1 § 11 of the Hawai'i Constitution"² were violated when the circuit court limited cross-examination of state witnesses. In the argument section of her brief, Jhun drops the sixth amendment and article 1, § 11 argument; she then argues that the court's limitations on cross-examination of state's witnesses violated her rights under "sections 5 and 14 of Article I of our State Constitution."

² Article 1, § 11, of the Hawai'i Constitution concerns grand jury counsel, which is not at issue in this case.

Jhun is again challenging the court's exclusions of evidence and limitations to Jhun's cross-examination of prosecution witnesses. This argument lacks merit as previously discussed in section III.B. supra.

D. Denial of Motion for Judgment of Acquittal

Jhun was charged and convicted of one count of violating HRS § 711-1106(1)(a) (Supp. 1999), which reads as follows:

- (1) A person ~~§711-1106~~ **Harassment.**
offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:
- (a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact[.]

Jhun argues her motion for judgment of acquittal should have been granted because there was insufficient evidence to prove beyond a reasonable doubt that Jhun was guilty of Harassment.

There was substantial evidence that Jhun offensively touched Chau. Chau testified that "[w]hile I were talking to the customer, someone attacked me from the back." Chau stated that "when I were hit, I were push forward." Chau did not expect the touching. Chau testified she found this touching offensive. Police Officer Phillip Snoops (Snoops) responded to "an argument type call" at Duke's lane on October 30, 1999. Snoops testified that Jhun admitted to tapping Chau on the shoulder during "an

argument, or they had words, and that she did indeed tap her on the shoulder." Defense witness Kim testified that he saw the back of Jhun's hand tap the midsection of Chau's left arm. Jhun testified that she tapped Chau "two times" on "Diana left side" with the "[b]lack part of my hand."

There is substantial evidence to support the trial court's finding that Harassment was established beyond a reasonable doubt because Jhun intentionally harassed, alarmed, or annoyed Chau by offensively touching her.

IV. CONCLUSION

The circuit court's April 26, 1999, judgment in this case is affirmed.

Counsel for Jhun is warned to comply with HRAP Rule 28(b)(4) in the future or be sanctioned by this court.

DATED: Honolulu, Hawai'i, January 9, 2001.

On the briefs:

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Chief Judge

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